THEORIES RESTRICTING PARTY AUTONOMY

ANY objections have been raised against the right of parties to select their law. Often overlapping and elusive, they may be distinguished according to their main ideas.

I. DOCTRINES OF GENERAL SCOPE

1. Doctrines Reserving Imperative Rules

(a) Imperative rules of a predestined law. As mentioned before, in the majority opinion of the scholars, every contract is born into a certain law, the "imperative rules" of which it cannot escape. That is, any rules of this law which parties cannot modify by contracting in a purely domestic sphere, they do not avoid by an agreement that another law should govern.

Although the numerous followers of this doctrine are categoric in asserting that imperative rules are inescapable, they strongly disagree in determining what rules are imperative. The learned reporter of the Institute of International Law, Baron Nolde, sternly warned against the frequent tendency of the literature to reduce these norms to a small number of secondary problems identical with what is properly called "ordre public." These concern such classic examples as wagering, usury, smuggling, or social protection.

1 The arguments have been expounded with particular authority by Lorenzen, 30 Yale L. J. (1921) 565; Niboyet, Recueil 1927 I, 13, 36, 53, 62; Pillet, Principes § 227; Audinet, 1 Mélanges Pillet 65.
2 As a recent example, see the convincing demonstration by Esmein in 6 Planiol et Ripert, Traité Pratique 646 that provisions of domestic law, protecting the weaker parties or the interests of society in general or good morals, can not simply be transposed into the international field.
perative rules, on the contrary, according to the reporter's energetic assertion, cover a "vast and normal domain," including formation and validity of contracts, the principle of freedom of contracting, the clausula rebus sic stantibus, rescission on the ground of nonperformance, the effect of contracts on third persons, assignment, plurality of subjects of obligations, "many" of the rules concerning discharge of obligations, and a "very great number" of rules dispersed in the codes including those on collective bargaining. Thus, not much remains for agreements of parties, nor is it easy to see exactly what their sphere may be.

This entire theory has influenced a few recent legislative texts, but it has been opposed at least by Anzilotti in the Institute, and more recently thoroughly refuted by English, French, and German writers. It has no real background in any of the significant court practices.

Nevertheless, in a new variant, the predestined law has taken the form of the locally "most closely connected law," pretending to decide whether the parties may submit to another law. Discussion may be deferred until we meet the problem of territorial limits to autonomy (infra p. 403).

(b) Lex loci contractus necessarily governing validity. The idea that every contract necessarily depends on the law of the place where it is made and, hence, is in an intimate and

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3 32 Annuaire (1925) 52-57.
4 Supra pp. 372-373.
5 32 Annuaire (1925) 512.
6 See Vol. 1, pp. 83-87. The last committee draft on the conflicts rules for sales of goods (1931) satisfied the opinion expressed by the great majority of governments in extending party autonomy to the "imperative rules." Art. 2 par. 1 says simply: "The sales contract is governed by the internal law of the country indicated by the parties to the contract," and par. 3 expressly includes "the conditions relating to the consent of the parties." See 7 Z. ausl.FR. (1933) 957; the committee report by Julliot de la Morandière has been printed as confidential.
inseparable conjunction with this law, is old. It goes back to Bartolus\(^8\) and was revived by the scholars believing in vested rights.\(^9\) Modern writers added their perennial fear of a *circulus inextricabilis*: party autonomy would determine the law which itself permits party autonomy.\(^10\) It is also argued that the essential requisites of contracts are regulated by "imperative" rules where the contracts originate,\(^11\) thus resuming the thesis mentioned before.

The old doctrine has undoubtedly left some vestiges. In the nineteenth century, even in the French courts, it preceded the revival of the principle of autonomy\(^12\) and, in its application to such contracts as transportation, seems to have retained much vigor.\(^13\) Remnants in this country are even more noteworthy in Beale's works,\(^14\) but they have their securest domain outside of conflicts law proper, in defining the power of a state to subject contracts to its domestic law notwithstanding the due process clause.\(^15\)

At present, Switzerland is the only important jurisdiction following this idea in its proper meaning, that is, making the *lex loci contractus* exclusively applicable without any possi-

\(^{9}\) See, among many others, Audinet, 1 Mélanges Pillet 67; Rolin, 1 Principes § 310; Strisower and Neumeyer, cited by Nolde, *Revue* 1926, 448; Minor 401; Beale, Summary § 2 and 23 *Harv. L. Rev.* (1910) at 270.
\(^{10}\) E.g., Niboyet, 1 Répert. 248 No. 37; Judge Learned Hand's "bootstraps" theory, *supra* p. 374 n. 63. *Contra*: see Wahl, 3 *Z. ausl. PR.* (1929) 791; Haudek 64; Batiffol § 386; Mayer, *op. cit.* (*supra* Chapter 28 n. 8) 111, 131.
\(^{12}\) See Batiffol 27-29 § 32.
\(^{13}\) Cass. (civ.) (Feb. 23, 1864) S. 1864.1385; Batiffol 258 § 284.
\(^{14}\) A decision influenced by the Restatement, Commissioner of Internal Revenue v. Hyde (C. C. A. 2d 1936) 82 F. (2d) 174 understands the clause of a trust made in France that it was "to be construed and interpreted by the law of New York" as not including the validity but only the meaning and effect of the terms. In the argumentation of the court, the intention of the parties is not supposed to be that they would withdraw the question of validity from the *lex loci contractus*—"nor would such intention, if expressed, be controlling."
\(^{15}\) See Alaska Packers Ass'n v. Ind. Accident Comm. (1935) 294 U. S. 532, and Stumberg 60.
bility for the parties to change the rule. The Federal Tri-
bunal in constant practice applies the law of the “place of
contracting” to all legal requisites of validity, such as offer
and acceptance, consent, permissibility, significance of error,
fraud or duress. The parties may determine the law govern-
ing the “effects” of a contract, but not that concerning its
“validity.”

The Restatement pronounces a similar rule, on the back-
ground, however, of a total exclusion of party choice.
(c) Illegality under lex loci contractus invalidating the
contract. One of Dicey’s influential exceptions to the proper
law theory states that validity of a contract under the proper
law is of no avail if the making of the contract is unlawful
under the lex loci contractus.

This statement, distinguishable from its probable mother
rule, above sub (b), precarious reposes on Lord Halsbury’s
well-known opinion. Although terming untenable the propo-
sition that a prohibition by the lex loci contractus could always
prevent us from enforcing a contract, he added:

“Where a contract is void on the ground of immorality
or is contrary to such positive law as would prohibit the
making of a contract at all, then the contract would be void
all over the world and no civilized country would be called
on to enforce it.”

Such a contract regarded as illegal, that is, “criminal” at the
place where it is made, would be regarded all over the world
as obnoxious to public policy and therefore void, though not
illegal. As a result, the House of Lords in In re Missouri
minimized the force of the Massachusetts statute prohibiting

16 See BGE.: 23 I 822; 32 II 415; 38 II 519; 44 II 280; 49 II 73.
17 Restatement § 332, cf. § 358.
18 DICEY 655 exception (2) to Rule 160; FOOTE 402. See for criticism
Year Book Int. Law (1937) 97, 103; CHESHIRE 278.
19 In re Missouri Steamship Co. (1889) 42 Ch. D. 321, 336; accepted as
exemption from carrier’s liability. Its violation, hence, was not a case of a “criminally” or morally tainted foreign offense that would move an English court. The distinction was made in remembrance of a curious old contrast between *mala in se* and *mala prohibita*, which a judge in 1822 had declared “long since exploded.”

More recently, Lord Wright in his turn, in the *Vita Food’s* case, has commented on Lord Halsbury’s dubious dictum in another questionable way. The fact is, however, that in all these cases and others, the judgment for validity was based purely on English law considered as governing the contract, despite the law of the place of contracting.

Only one English case, *The Torni*, is apparently consistent with the alleged rule, but its well-considered reason lies elsewhere, and has been rejected by the decision in the *Vita Food’s* case.

The conclusion had been reached even before the last-mentioned decision that invalidity under the law of the place of contracting as such is simply immaterial in English courts. Legality is determined by the proper law, except that enforcement may be refused also on the ground of the public policy of the forum.

Apart from academic theses, in this country obiter dicta may be found, such as in a supreme court decision, that parties outside of the state of New York may make the laws of this state controlling upon both parties,

“Provided such provisions do not conflict with the law or public policy of the State where the contract is made.”

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20 Best, J., in Bensley v. Bignold (1822) 5 Bar. & Al. 335, 341 noted by Mann, supra n. 18, 104 n. 13; cf. Williston, 6 Contracts 5066 § 1764.

21 Vita Food Products, Inc. v. Unus Shipping Co. (1939) A. C. 277, 297.

22 See Cook, Legal Bases 421ff.

23 Cheshire 278.

24 Infra p. 427.

25 Mr. Justice Brewer in Mutual Life Ins. Co. v. Hill (1904) 193 U. S.
This general formula is hardly more than a tribute to school reminiscences. In no other country is there any sizeable following of this theory.\textsuperscript{27}

(d) \textit{Prevailing rule.} All versions of a predestinated law have been abandoned by the present jurisprudence of mercantile countries. The English view is beyond any doubt. French and German courts definitely apply the law upon which the parties agree, with all its implications, and do not apply another law solely because it would be applicable in the absence of a party intention.\textsuperscript{28}

\textit{Illustration.} In a case decided by the Mixed Anglo-German Arbitral Tribunal in 1922, a contract entered into by correspondence between an English and a German member of the Liverpool Cotton Association, made subject to the Rules of this Association and thereby to the jurisdiction of the High Court of Justice and the law of England, was held valid under this law. It was immaterial which law would have

\textsuperscript{27} The only exception known to me is a surprising contention by NUSSEBAUM, D. IPR. 244 repeated in 51 Yale L. J. (1942) 908, Principles 176; against which see GUTZWILLER, 8 Z. ausl. PR. (1934) 656; MANN, supra n. 18, at 103, and Book Review, 7 Modern L. Rev. (1944) 172; RAAPE, D. IPR. 253; STAUB-HEINICHEN in 3 Staub 556 n. 11a. For the dominant view that illegality arising out of making the contract is treated like other questions of validity, see STUMBERG 242 n. 53.

\textsuperscript{28} England: It suffices to refer to the opinions of the Privy Council in the Vita Food's case, supra n. 21.

Belgium: POULLET 372 § 299 n. 2 reproaches the Belgian courts since they do not distinguish between supplementary and imperative rules.

France: The court decisions ought to be discussed at the proper places, but even ARMINJON, 2 Précis (ed. 2) 257 n. 1 § 79, cites only one decision, Cass. (civ.) (Jan. 8, 1913) S.1913.1.243, as being reluctant to admit all consequences of party autonomy. The decision refuses to recognize that an arbitration stipulated in the contract may judge the question of fraud, because French courts give effect only to conventions freely consented. Thus freedom of contracting is a ground for public policy overriding the conflicts rule which in itself is not contested.

Germany: See the stringent documentation by MELCHIOR 596ff.

Portugal: VEILJA BEIRÃO, draftsman of the C. Com., commented on art. 4 to the effect that every rule may be changed by the parties, except that on capacity. Only the subsequent doctrine introduced the "imperative" rules. See ESPINOLA, 8 Tratado 538.
governed without this submission and whether the contract would have been unenforceable under the German prohibition against dealing in futures.\textsuperscript{29}

In the United States, the questions involving validity of the contract are decided in a majority of states according to criteria other than the law of the place of contracting, and often according to the intention of the parties. The dogma postulated by Beale exists nowhere.

2. Evasion

(a) \textit{Fraudulent evasion}. The French doctrine of "\textit{fraude à la loi}," although slowly vanishing, in certain cases has been applied, under an apparently broad formula, to stipulations in favor of a foreign law, when a contract was both made and to be performed in France.\textsuperscript{30} However, the nucleus of these cases consisted in c.i.f. sales contracts on overseas grains, made between Frenchmen in France under the standard forms of the London Corn Trade Association and similar to those under which the seller had bought the goods overseas. That nullity of such agreements violated the interests of international commerce, was recognized by the Court of Cassation itself. Moreover, it is characteristic of the crude method protecting some true or imagined domestic public interest by the theory of fraud, that in most cases the required evidence of "fraudulent" evasion could not be produced.\textsuperscript{31}

(b) \textit{Contracts without foreign elements}. The German Reichsgericht once nullified a stipulation of choice of law in an isolated case. An agreement with a matrimonial agency

\textsuperscript{29} Gruning & Co. v. Gebr. Fraenkel (Feb. 6-17, 1922) 1 Recueil trib. arb. mixtes 726. To the contrary effect, for instance, the Czechoslovakian Supreme Court (March 2, 1934) \textit{10 Z. ausl. PR.} (1936) 168: action for the balance arising out of a grain transaction, dismissed on domestic standards. For this application of public policy, see \textit{infra} Chapter 33 pp. 568 ff.

\textsuperscript{30} Cass. (civ.) (Feb. 19, 1930) and (Jan. 27, 1931) \textit{S.1933.1.413}; and cases mentioned by BATIFFOL 63 n. 4.

\textsuperscript{31} BATIFFOL § 70.
was made and to be performed in the Kingdom of Saxony, both parties being resident there. The contract referred to Prussian law which, in contrast to the Saxon, considered valid a promise of award given to a matchmaker.\(^{32}\)

Here, indeed, the transaction belonged, personally and substantially, to one jurisdiction, lacking all and any foreign elements; the parties referred to a foreign law exclusively for the purpose of evading a prohibition intended to maintain good morals. The case deserves to be noted in this respect but has often given rise to exaggerated conclusions.

(c) *Lex fori in imperative role.* The Austrian and several Latin-American Codes have gone so far as to make the law of the forum imperative in large groups of cases, such as those where the contract is performable in the country or where nationals of the country contract abroad.\(^{33}\) A similar provincialism occurs in sporadic cases throughout the world, when a court for the protection of a resident believes itself entitled to apply its domestic statutes without justifying a stringent public policy of the forum.

(d) *American law.* The American position is not simple to state. It appears that repeatedly stipulations of choice of law have been disregarded, for varying reasons or sometimes almost without justification, evidently on the ground of a belief such as that expressed by Beale that the parties have no right to select a law. However, these cases are a small minority. Furthermore, they belong, with isolated exceptions, to certain groups which we shall have to discuss hereafter (*sub* II and III). Anticipating the result, we may note that the cardinal rule, also in this country, particularly at present, is the acknowledgement of the right of the parties to de-

\(^{32}\) RG. (Sept. 21, 1899) 44 RGZ. 300.
\(^{33}\) E.g., Argentina: C. C. art. 1243 (1209).
Mexico: C. C. art. 13.
See for more details *supra* Chapter 28, pp. 370-372.
termine the law, and all exceptions that can seriously be sustained simply flow from public policy.

3. Requirement of Substantial Connection

In a current of dicta, English and American authorities have required as a matter of course, that the intention of the parties to select a law must be confined within certain limits. American courts have said that an agreement of the parties to choose a law should be "made with a bona fide intention," not "fictitious," based on "a normal relation" or a "natural and vital connection." English decisions have declared that the chosen law ought to have "a real connection with the contract," or that the intention expressed should be "bona fide and legal." Also, the German Supreme Court has sometimes mentioned that the parties may stipulate a law in material connection with the obligation, and similar views are likely to occur in other courts. Some theoretical backbone was sought for all these propositions in the doctrine of Westlake:

"That the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the

34 2 WHARTON 1210 § 510 (a) is cited for this requirement in Seeman v. Philadelphia Warehouse (1928) 274 U. S. 403, 408.
35 Crawford v. Seattle etc. R. Co. (1915) 86 Wash. 628, 150 Pac. 1155.
37 2 WHARTON 1210 § 510 (o); Green v. Northwestern Trust Co. (1914) 128 Minn. 30, 150 N. W. 229 (usury).
40 RG. (July 5, 1910) 74 RGZ. 171, 173; (July 8, 1910) Recht 1910 No. 3358; (April 4, 1928) IPRspr. 1929 No. 31; (May 28, 1936) JW. 1936, 2871.
Switzerland: BG. (July 16, 1898) 24 BGE. II at 544, cf. HOMBERGER, Obl. Verträge 45.
country with which the transaction has the most real connection, and not the law of the place of contract as such.  

It should be noted that this famous passage in an excellent formulation advocates an objective construction of the applicable law, in criticism of the traditional mechanical application of the law of the place of contracting. Whether the idea was latent in Westlake that a law to be selected by the parties must have some connection with the contract, is not clear. Certainly, he did not pretend that the parties have to choose just that law which a judge would think to be in the closest connection—as recent English writers propose. 

In fact, other writers, with whom Cook apparently associated himself, conclude that choice by parties is limited to those countries with which the contract has a “substantial” connection. Hence, in the cases of multiple local connections, the parties may select any one of these contacts, if it is not merely accidental; they are not bound to select the one contact which a judge would assume to be the most vital. Otherwise, the axiom would indeed abolish autonomy altogether. But even so, we notice at once that this establishes a broad theory against evasion which nevertheless does not prevent the parties from choosing a foreign law having some “substantial” connection with the contract but rejects claims of the forum grounded on a much closer connection. Such a
theory is unable to replace that of public policy. What, then, is its value? And why can the forum not tolerate a foreign law not "connected" at all with the contract, when not harmful to its public policy? With these questions in mind, we shall register what further information can be gained.

The Polish Law on private international law has preferred another approach. It enumerates the law open to choice as follows:

The parties may submit an obligation to the law of the national state, the law of domicil, the law of the place of making the transaction, the law of the place of performance, or the law of the place of situs.\(^\text{47}\)

In Beale's system the question is nonexistent, but the places of contracting and performance are the only ones he recognizes at all as contacts.\(^\text{48}\)

Feeling that the familiar formulas include much obscurity, Lord Wright, speaking for the Judicial Committee of the Privy Council in the much discussed Vita Food's case, has had the merit of attempting clarification. On the rule that the ascertained intention of the parties is conclusive, he observes:

"It is objected that this is too broadly stated and that some qualifications are necessary.... But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is \textit{bona fide} and legal, and provided there is no reason for avoiding the choice on the ground of public policy."\(^\text{49}\)

Again, this comment needs supercomment. What does "\textit{bona fide}" and "\textit{legal}" mean?\(^\text{50}\) Had the court in mind

\(47\) Art. 7. See against this attempt of regulation, \textit{Haudek} 44.

\(48\) 2 \textit{Beale} 1127 n. 8, 1159 n. 4, 1166 n. 6. \textit{Contra: see Batiffol} 53 n. 3 and 4.

\(49\) [1939] \textit{A. C.} 277 at 290.

\(50\) See Note, 55 \textit{Law Q. Rev.} (1939) 323, 325.
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... evasion under qualifying circumstances? Yet Lord Wright was prepared to give effect to a most obvious escape from Newfoundland to English law, in a case of an affreightment beginning in Newfoundland, "even where the parties are not English and the transactions are carried on completely outside England."

As mentioned earlier, a citizen of Ecuador who had no ties with England and a Canadian corporation contracting in New York could validly submit to English law in the eyes of an English court. 51

There is more reason for wonderment. Apart from frequent references in the American usury cases, which are a special matter, when courts mention the requirement in question, 52 they quite regularly do so in order to state that in the case at bar the contract does have a sufficient connection with the chosen law. This is true for most American as well as for all English and German decisions, 53 and this is only natural. In regular commerce, parties never select a law having "no" relation to their obligations. 54

The Supreme Court of Rhode Island, however, in the case of an employment contract, once made serious use of the alleged rule that questions of validity and construction cannot be referred by the parties to the law of a state in which the contract is not made nor to be performed. 55 For some reason

51 British Controlled Oilfields v. Stagg (1921) 66 Sol. J. 18, supra p. 381 n. 91.

52 Out of 18 cases considered in the note, "Validity and effect of stipulation in contract etc.," 112 A. L. R. 124 to 130 (left), only three are not concerned with usury. One trust case is without significance. On the two others, namely, Gerli v. Cunard S. S. Co., involving bills of lading, see supra p. 374 n. 63, and on the principal case, Owens v. Hagenbeck, see below n. 55.

53 For the American cases see BATIFFOL 41 n. 1. In England, the decision in "The Torni" is no counter-instance and its main argument has been challenged in the Vita Food's case. The German decisions cited supra n. 40 have in each case approved of the stipulation.

54 See MELCHIOR, 3 Z.ausl.PR. (1929) 179.

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Unfortunately not revealed in the case, the employing circus enterprise, whose permanent address was Chicago, localized the contract in Sarasota County, Florida. Counsel for the firm adduced dubious evidence for his plea that under the Florida decisions the plaintiff could be dismissed practically at the defendant’s pleasure. The court, quite evidently moved by a strong feeling of social equity, rejected the plea by refusing the express reference to Florida law, allegedly not substantially connected with the contract, and simultaneously eliminated as not proved, the law of Indiana where the contract in fact was executed. Massachusetts, where the defendant gave written notice and where the circus was held until the expiration of the term for dismissal, was not further mentioned. Thus, the Rhode Island court seized of the suit during a brief performance in Providence, believed itself entitled to apply the law of its own state, which had no connection whatever with the contract. This happened in the name of the requirement of close connection. An arbitrary use of conflicts rules, once more, had to lead, on an easy though incorrect way, to an equitable decision.

Of course, there is a practical question involved. Originally, the writers seem to have believed that choice by the parties is geographically limited, and the Polish list of permitted contacts reaches the same result. In international relations, however, there are many cases in which a contract ought to follow the legal fate of another agreement. When a grain shipment under a form of the London Corn Trade Association, arriving from Argentina to Bordeaux, is resold by the French buyer to another Frenchman in France, this is a “contra de suite.” The middleman in this frequent situation is in dire straits if he is liable to his successor on warranties

56 Clearly so, HAUDEK 39, rejecting (40 n. 3) my opinion (infra n. 57) with the contention: when goods sold do not touch English territory, the interest of the parties in English law which they select, is not based on the international structure of the contract but is only personal to the seller.
not covered by his rights of recourse against the Argentine vendor.\footnote{RABEL, 4 Z.ausl.PR. (1930) 417 followed by WOLFF, IPR. 87; RABEL, 1 Recht des Warenkaufs 53; BATIFFOL 54 § 59.} As early as 1909, a German appeal court expressly denied the existence of a public policy precluding two German merchants in grain from submitting to London arbitration and English law.\footnote{OLG. Rostock (Feb. 22, 1909) 65 Seuff. Arch. No. 1, 20 Z.int.R. 92.} French courts, haunted by their fear of “fraude à la loi,” could not satisfy this need, but their mistakes will probably not be repeated anywhere else.\footnote{Supra p. 400.} Normal economic interests of those engaged in international trade must be as well safeguarded as trade within a territory.

Other examples of “entailed contracts,” which should conveniently be adjusted to the law that governs another contract, have been adduced, such as a bond for a foreign debt,\footnote{BATIFFOL 56; M. WOLFF, IPR. 87 and in 49 Jurid. Rev. (1937) 120.} reinsurance, and subsequent insurance for merchandise \textit{in transitu} on a vessel.\footnote{Cases brought to attention by HAUDEK 41.} Analogous reasoning would quell doubts, when a debt guaranteed by mortgage in one state, is expressly subjected to the law of the situs, even though no other contact with it existed.\footnote{In American Freehold Land & Mortgage Co. v. Jefferson (1892) 69 Miss. 770 the parties stipulated for the law of Mississippi where the land security was. The court held the stipulation to be void (infra n. 73) whereas the case is suitable to demonstrate the need of a clear recognition of such agreements.} A reference to English law will not be rejected by English or German courts whenever a certain type of contract is internationally unified according to English commercial customs, irrespective of the individual parties to the contract.\footnote{See CLAUGHTON SCOTT, Conférence de la Haye, Actes de la Sixième Session 296; M. WOLFF, 49 Jurid. Rev. (1937) 120 and Priv. Int. Law 428 § 402.} International commerce, indeed, must escape the narrow margins of any formula binding the parties to one or the other of their domiciliary laws and look for unified usages and stipulations.
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It has been conceded, moreover, that parties may select a law for the reason that they know it well or because it is competently elaborated.\footnote{Such a situation evidently occasioned the party agreement in British Controlled Oilfields v. Stagg (1921) 66 Sol. J. 18; Batiffol 55 § 60.} For this reason, English courts seem always to recognize the reference to English law. Why should they not? Why, indeed, should an American court not allow residents of the Philippines and Australia to agree in a contract on the application of the law of California?

Finally, as is well known, English courts are inclined to accept submissions to English law without any qualification. This has recently been advocated in generalized form as a privilege for the \textit{lex fori} of all countries.\footnote{M. Wolff, Priv. Int. Law 428 § 403.} But in a reasonable international private law, it should not be so significant which forum is seized of the case.

It seems after all that the alleged general rule limiting the choice of law by the parties to a determined number of legislations, does not and should not exist. Its possibly more serious purpose is sufficiently defined through the old concept of evasion of some law; but this purpose must be pursued on the basis of its own merits—which are very small.

II. SPECIAL AMERICAN DOCTRINES

The following topics cannot be treated without anticipating in some respects the conflicts rules existing in case the parties have not determined the applicable law, but such discussion is needed for a final judgment on the limits of party autonomy.

1. Usury Statutes\footnote{No comparable doctrine exists abroad.}

In regulating the rate of interest in loan contracts, the various jurisdictions employ different methods and permit varying amounts. With respect to a contract fixing interest
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without an additional stipulation for the applicable law, former divergent conceptions have been finally superseded by a habit of maintaining the stipulated rate, provided that it is agreeable to some law connected with the contract, such as the law of domicil of either party, or that of the place of payment, or sometimes that of the situs of a land security. Thus, if a loan is made by a Pennsylvania corporation to a resident of New York, who even pledges certain property in New York as security, the Supreme Court of the United States has declared the agreement lawful, although it would have been void under New York law. Mr. Justice Stone said:

"... We think it immaterial whether the contract was entered into in New York or Philadelphia. ... Respondent, a Philadelphia corporation having its place of business in Philadelphia, could legitimately lend funds outside the state and stipulate for repayment in Philadelphia in accordance with its laws and at the rate of interest there lawful, even though the agreement for the loan were entered into in another state where a different law and a different rate of interest prevailed."

In this group of cases, we find in fact a combination of two tendencies that have been generalized in the literature. One idea is that several state laws are connected with the contract and the judge may choose among these but no other laws. The other impulse is given to favor the law upholding the stipulation. Thus, this entire doctrine does not serve as a limitation but as a favor to the contract.

As a third feature of the cases, however, the connection has to be "real," not "fictitious." The North Carolina court, finding that payment under a contract was arranged to be made in another state solely for the purpose of avoiding the

67 See Stumberg 212; Goodrich § 108; 2 Beale § 347.4; cf. also 6 Banks and Banking (Michie 1931) 199 and Supp. (1945).
69 Arnold v. Potter (1867) 22 Iowa 194.
usury statute of North Carolina, applied the latter.\textsuperscript{70} In this sense, the stipulation of interest must be covered by the law of one of the places bona fide involved in the case. \textit{Bona fide} seems to mean that the place should not be \textit{intentionally} selected for the purpose of evasion.

\textit{Stipulation for a law}. It is in this light that we must regard the approximately twenty-six decisions dealing with stipulations on the applicable law.\textsuperscript{71}

Of fourteen usury cases holding such stipulation void, eleven invalidate it because it refers to a foreign law conflicting with that of the forum.\textsuperscript{72} Only one old Mississippi case protests against the advantage taken of its own usury statute in a contract made in either New York or Tennessee; it is a singular case also in the respect that the situs of the mortgage in the state, for most courts one of the most vital contacts, is disregarded.\textsuperscript{73} Another case, in a lower court, disregarding the reference to Virginia law because the contract has more relation to the District of Columbia, concerns a loan corporation chartered in Virginia but operating in fact in Washington, D. C. The judge observes that if the payment had been stipulated to be in Virginia, the stipulation would have been proper.\textsuperscript{74}

\textsuperscript{70} Meroney v. Atlanta National Building and Loan Ass'n (1893) 112 N. C. 842, 17 S. E. 637; Ripple v. Mortgage and Acceptance Corp. (1927) 193 N. C. 422, 137 S. E. 156. See also infra ns. 74 and 75.

\textsuperscript{71} I am much indebted to Mrs. Oberst, formerly Elizabeth Durfee of Ann Arbor, for her excellent contribution in establishing the list of these cases and the conclusions to be inferred from them.


\textsuperscript{73} American Freehold Land & Mortgage Co. v. Jefferson (1892) 69 Miss.

\textsuperscript{770, supra n. 62.}

\textsuperscript{74} Stoddard v. Thomas (1915) 60 Pa. Super. Ct. 177, 181.
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It is impressive that nine of these fourteen cases were prior to 1902. In the few others, the principle that any law having a substantial connection with the contract suffices, is expressly adopted. In the four last cases (of 1923, 1930, and 1931), the place of incorporation of the lending Delaware company, different from its principal place of business, is discarded, but the rate stipulated in the contract is nevertheless saved by judicial choice of another law validating the contract.75

Twelve decisions, from 1865 to 1937, agree in applying the stipulated law, which in half of the number was that of the borrower and in the rest that of the lender.76 A Kansas decision holding a stipulation for Colorado law valid, since many elements of the contract related to Colorado, refuted the contrary opinion, as follows:

“The position assumed by some courts in reference to this matter, when considering building and loan association cases, can scarcely be regarded as anything less than the result of a tour de force.”77

Thus, the courts in this matter are not satisfied with the mere fact that the parties have signed the agreement. They analyze the facts in order to see whether enough elements support the stipulated localization, with the alternative that the parties are deemed to have intentionally evaded the usury laws of some other state.

75 See the last three citations, supra n. 72, and Manufacturers Finance Co. v. B. L. Johnson & Co. (1931) 15 Tenn. App. 236.
In summary, although it remains not quite certain which combination of elements will satisfy a court, it seems that the stipulation is likely to be accepted when it refers to the law of a state in which one of the parties is effectively domiciled and in which at the same time either the contract is deemed to be made, or to be performed, or the land security is situated, or payment is to be made.

Hence, the usury doctrine of the American courts, also in its extension to express agreements on the applicable law, is a remarkable specialty, suggestive of ideas, but by no means susceptible of simple generalizations. It rather demonstrates the usefulness of an elaborate approach to individual problems.

2. Insurance Statutes

In “a few instances,” courts of this country have disregarded express contract stipulations determining the place of the contract and thereby the applicable law. It seems that all these decisions were rendered in Massachusetts and Missouri. The latter state has waged a long and gallant legislative

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78 In U. S. Building & Loan Ass'n v. Lanzarotti (1929) 47 Ida. 287, 274 Pac. 630, 632, with no express reference to a law, the agreement that the note should be paid in Montana at the domicile of the lending corporation, was rejected as not supported by innocent intent. If facts of the case were better known, the true motive of the court would be clearer.

79 COUCH, 1 Cycl. of Insurance Law (1929) 441. These cases, it seems to me, have impressed BATIFFOL 60 n. 1 by far too much; but, it is true, CARNACHAN, Conflict of Laws and Life Insurance Contracts (1942) 95, 562 also voices the impression that choice of the law of the home office of the insurer is ineffectual. Regrettably, he does not substantiate this thesis.


battle, with repeated reverses in the Supreme Court of the United States, to protect its residents against forfeiture clauses and other contractual deteriorations of their insurance in New York companies. 

Certainly, if an insurance contract has all the characteristics of a Missouri contract, stipulations inserted in the policy providing, for example, for a different rule of computation from that prescribed by the statute or for waiver of surrender value, forbidden by the statute, would be recognized as ineffectual at present as it was in 1891 with the approval of the Supreme Court of the United States. If in such a case of an insurance contract belonging to the law of one state, the law of another state is stipulated for, it is a question of public policy whether the statutory prohibition should be maintained nevertheless. A court, then, may qualify the agreement as an ineffectual attempt at evasion within the sphere of the prohibition. This, indeed, seems to be the view taken for a long period in Massachusetts in certain cases of violations. The agreement, however, ought not to be considered void as a whole. The Missouri court exaggerated by asserting that the interpretation and effect of the terms of insurance are governed by Missouri law when the contract is deemed to have been made there, despite a clause referring to New York law.

However, the vastly prevailing doctrine respecting insurance contracts is summarized in the leading encyclopedia to

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81 Instructive: Missouri Annotations to the Restatement 142 § 332.

82 Equitable Life Assurance Society v. Clements (1891) 140 U. S. 226. I cannot agree with the conclusion by LORENZEN, 30 Yale L. J. (1921) at 579 n. 73 from this decision that the intention of the parties is not permitted to violate the statutes of the lex loci contractus.


84 Pietri v. Seguenot (1902) 69 S. W. 1055, 1057. Kerner, J., in New England Mutual Life Ins. Co. of Boston, Mass. v. Olin (C. C. A. 7th 1940) 114 F. (2d) 131, 137, despite his similar sweeping dictum in an otherwise correct opinion, certainly wanted to say only that the contract and the agreement involved were made in fact in Indiana, and therefore the nonforfeiture statute of Indiana prevailed over the stipulation for Massachusetts law.
the effect that, "if the policy or certificate does expressly pro-
vide that a specific state shall be the place of contract, the law
of the state agreed upon as governing controls the nature,
validity, interpretation, and effect of the contract, whether
the specified state be the state wherein the contract was made,
or a foreign state or country and notwithstanding the insured
resides, or the property is located, in another state." 85

This being the settled rule, all justifiable exceptions are
fully explained by the operation of a specific public policy,
a viewpoint needing separate discussion.

The constitutional limits of public policy to be exercised
by a state, have been illustrated in New York Life Insurance
Company v. Dodge. By a contract undoubtedly made in Mis-
souri, a resident of that state was insured in a New York
company. The insured concluded a collateral agreement with
the company under the stipulation that the agreement should
be deemed to have been made in New York, although most
elements of its conclusion pointed to Missouri. The Supreme
Court of the United States denied the state of Missouri the
constitutional power to enforce its prohibitions against this
agreement, thus rejecting the argument sustained by Mr.
Justice Brandeis in a dissenting vote that the individual's
right created under the Missouri contract was not susceptible
of being disposed of by contracting anywhere. 86 However, on

85 COUCH, 1 Cycl. of Insurance Law 440 § 199; see also Note, 112 A.L.R.
Thomas (1915) 60 Pa. Super. Ct. 177 at 181 where a stipulation for the law
of the domicil of a finance company was invalidated, supra n. 74: "No one
questions the right of a corporation, such as an insurance company for example,
to provide that its policies although issued to a person in another state, shall
be governed by the laws of the state of its residence."

It is agreed that where the law of the insurer's domicil is more favorable to
the claimant, express provisions in its favor are readily recognized. See, for
instance, CARNAHAN, supra n. 79, 252 n. 85.

86 New York Life Ins. Co. v. Dodge (1918) 246 U. S. 357, 375 (opinion
of the court); 377, 382 (dissenting vote) among other arguments probably
not equally prominent in Mr. Justice Brandeis' mind.
this question there is a long line of federal as well as state
decisions which it is difficult to reduce to a summary.\textsuperscript{87}

In addition, courts have approved the claim of states to
govern insurance policies issued to residents by foreign com­
panies licensed to do business in the state.\textsuperscript{88} In the case of in­
surance, indeed, states are entitled to the exercise of greater
control, unless new restrictions are to follow from extending
the Interstate Commerce Clause of the Constitution to in­
surance business.

\textbf{III. Exemptions from Liability}

\textit{Municipal laws and unifications.}\textsuperscript{89} While no debtor can
effectively stipulate that he should not be responsible for his
own fraudulent conduct,\textsuperscript{90} gross negligence is treated on the
same footing only in part of the legislations. Moreover, many
courts traditionally view stipulations lessening the extent of
liability with disfavor and construe them punctiliously, al­
though at present in most commercial cases insurance may
replace such liability.\textsuperscript{91} Finally, in certain cases, liability for
lack of ordinary care (negligence, \textit{culpa levis}), either of the
debtor himself or also of his agents, may not be contracted
out under modern views, the strictest of which are to be
found in this country. Thus, in contrast to British and German
laws, the Supreme Court of the United States has proclaimed
that common carriers by land and sea could not exempt them­selves from liability for loss or damage arising from negli­
gence of their servants, “and that any stipulation for such

\textsuperscript{87} See \textit{Carnaahan, supra n. 79}, 71ff.; 554, 574-586, 589ff.
\textsuperscript{88} New York Life Ins. Co. v. Cravens (1900) 178 U. S. 389; Great Southern
\textsuperscript{89} \textit{Cf. Holländer}, \textit{3 Rechtsvergl. Handwörterbuch} 534.
\textsuperscript{90} \textit{Paulus in Just. Dig.} 2, 14, 27, 3: \textit{Illud nulla pactione effici potest, ne
dolus praestetur.}
\textsuperscript{91} See a similar observation by \textit{Glanville Williams, 7 Modern L. Rev.}
(1944) 75, 154 commenting on a new English decision.
exemption was void as against public policy." The declared reasons for supporting this thesis were the economic preponderance of big enterprises, not giving customers fair opportunity to bargain for conditions, and the educational purpose of severe rules of behavior. Later, stipulations for foreign laws favorable to the carriers were disregarded, because frequently the party submitting thereto has no actual intention to do so and there is no freedom of contracting. The federal legislation regulating interstate communication and carriage by land and sea was inspired by these views. With respect to maritime affrightment—which has created the outstanding international problem in this field—the Harter Act of 1893 and subsequent congressional acts have established liability of the shipowner for certain occurrences without possibility of exemption, while no liability exists in other cases. Canada, Australia and New Zealand have enacted laws following this model. A variant of the same method was pursued in the Hague Rules of 1921 and, on their basis, by the Brussels Convention of 1924, ratified by many states, which has also been incorporated into English and, recently, American

93 New York Central R. Co. v. Lockwood (1873) 17 Wall. 357, 379.
96 Australia: Sea Carriage of Goods Act, 1904.
Canada: Water Carriage of Goods Act, 1910 (9 & 10 Edw. 7, c. 61).
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laws. France and Italy diverge only in certain significant particulars.

Land transportation rules of civil law countries have been largely unified by the conventions of Bern on the carriage of goods, and a similar convention on carriage of passengers has been signed. The latest endeavors have been devoted to air transportation, in which field regard for the weak position of private customers has seemed to be counterbalanced by the desire of many states to develop a young and costly industry. Nevertheless, in conventions, numerous laws and cases, comparative severity has prevailed, although the standard of liability maintained in this country against maritime carriers considerably surpasses the risks imposed on air carriers under the Warsaw Convention.

More isolated legislation in particular countries has dealt with restrictions on liability in employment contracts, agreements of attorneys and notaries, and others. Differences, however, still exist in all fields, some of considerable weight.


100 France: See DEMOGUE, 5 Obligations 462-501; JOSERAND, Les transports (ed. 2) 609 § 627ff.; ESMEIN in Planiol et Ripert, 6 Traité Pratique 560 § 400ff.; DANJON, 2 Droit Marit. § 845ff.; RIPERT, 2 Droit Marit. § 1737ff. Italy: The principles concerning maritime affreightment have been summarized in Cass. (Feb. 27, 1936) Foro Ital. 1936.1.297, 35 Revue Dor (1937) 291.


103 Convention of Warsaw for the Unification of Certain Rules regarding International Air Transport, of Oct. 12, 1929, HUDSON, 5 Int. Legislation 100.

104 ALLEN, "Limitation of Liability to Passengers by Air Carriers," 2 Journal of Air Law (1931) 325.

105 For the United States, see Note, 54 Harv. L. Rev. (1941) at 666.

106 ROBINSON, Admiralty 560.
To appreciate the varieties and the merit of the unifications obtained, the background of policy must be remembered. The variety of maritime liability has now largely been ended by successful unification, but forms a memorable chapter of history. Shipping in England and Germany and marine insurance in England have had an eminent function in the public economy; it was often thought a national interest to maintain their power of competition at low rates, whereas affreighters and passengers were supposed to cover their risks by insurance. In the authoritative French opinion, efficient prohibitions on exemption clauses have always been believed impossible except by international convention, lest French shipping be sacrificed to foreign competition. Also, the various rules of liability and nonliability combined by the Harter Act, though largely influenced by the desire to protect American cargo shipping which at that time was mostly carried on foreign lines, were also designed to facilitate the carrying trade in order to aid incipient American shipping competition with foreign rivals. Certain liabilities of the general maritime law were considerably lessened and the bargaining position of the American companies was improved by imposing the same conditions on foreign vessels leaving, or even headed for, American ports. These circumstances influenced a series of conflicts cases, which have remained the leading cases on the entire matter in discussion, although the domain of possible conflicts of laws in sea carriage of goods is greatly narrowed at present. We must therefore concentrate on this classic topic.

Conflicts law. There is no doubt about the principle that the law governing a contract also determines the permissibility of agreements releasing or restricting the obligor’s

107 See RIPERT, 2 Droit Marit. 761, 773.
108 On the American interstate conflicts remaining since the federal enactments, see Note, “Limitations of Carriers’ Liability and the Conflict of Laws,” 54 Harv. L. Rev. (1941) 663.
liability, even though this law may be called for by another stipulation. With regard to carriage of goods by sea, this has been recognized not only in the English, German, and Italian courts, but also in the United States. Where an English vessel takes on a cargo in Liverpool for transportation to Cuba, both the stipulations referring to English law and exempting the shipowner from liability for negligence of the mate, have been held valid.

Conflicts arise, of course, when a vessel sails from Liverpool to Baltimore; the English courts definitely claim that its contracts of transportation are determined by English law, while the American courts since the Harter Act subject it to American law. Other conflicts are caused by the abstinence of the Brussels Convention from regulating transportations agreed upon without issuing a bill of lading and from including the periods of time before the goods are loaded on and after they are discharged from the ship (art. 1 b and e); and particular divergences arise out of the unregulated methods of implementing the Convention, which may be

100 Atchison, Topeka & Santa Fe R. Co. v. Smith (1913) 38 Okla. 157, 132 Pac. 494 should not be excepted; the decision validates a waiver of liability printed on the back of a free railway pass, in application of the law of the forum deemed to be the law of the place of performance, although favor for the law more favorable to the stipulation (i.e., the waiver) is also expressed.

110 In re Missouri Steamship Co. (1889) 42 Ch. D. 321.

111 RG. (May 25, 1889) 25 RGZ. 104, 107; (Jan. 2, 1911) 75 RGZ. 95.


114 The Miguel di Larrinaga (D. C. S. D. N. Y. 1914) 217 Fed. 678 (English law stipulated, English vessel from Liverpool to Cuba); and see Note, 35 Yale L. J. (1926) 997.


done by ratifying and sanctioning it as a whole, or by ratifying it and reproducing it more or less exactly in separate laws (Protocol of Signature, par. 2), or else by adopting a part of it in an independent law.\footnote{117} The only problem, however, presenting itself at this juncture, concerns the nonapplication of an exemption clause stipulated under a law selected by the parties. Decisions denying effect to such clauses must be regarded as exceptions to the rule and need justification by strong public policy on the ground of a sufficiently close relation of the case with the territory of this policy. In fact, the laws and courts are far from giving an exclusive role to the \textit{lex loci contractus}.

Dealing with the Harter Act, the American courts have interpreted the Act as including, in all its provisions, foreign vessels\footnote{118} leaving or arriving\footnote{119} in American ports. In all these cases, a clause of exemption contrary to the Act is invalid, although it may be valid under the law of the place where the contract is made or the law agreed upon.\footnote{120} This has been laid down very distinctly in section 13 of the Carriage of Goods by Sea Act, 1936. Dutch law prescribes, likewise, that reference to foreign law is not generally able to restrict liability of shipowners, but recognizes stipulations if valid by the law of the place where the goods are loaded,\footnote{121} at least in the case of foreign vessels.\footnote{122}

\footnote{117} This fact has been deplored by Bateson, J., in The St. Joseph [1933] P. 119, 134. The divergences of the French Law of April 2, 1936 from the Brussels Convention (ratified by France according to the Law of April 9, 1936 by Decree of the President of March 25, 1937) are reviewed in the Note, S.1936.s.165ff.
\footnote{118} The Silvia (1898) 171 U. S. 462; The Chattahoochee (1899) 173 U. S. 540, 550.
\footnote{119} Knott v. Botany Mills (1900) 179 U. S. 69.
\footnote{120} To an analogous effect, Belgium: C. Com. art. 91 as amended by Law of Nov. 28, 1928, art. 1, discussed in The St. Joseph [1933] P. 119, 121.
\footnote{121} Knott v. Botany, \textit{supra} n. 119.
\footnote{122} The Netherlands: C. Com. (1838) arts. 470, 470a, 517d, cf. 520t.
\footnote{122} Rb. Rotterdam (June 15, 1938) W. 1939, 617 restricts art. 517d to foreign vessels.
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and Chile, as well as the former Italian Commercial Code according to a certain interpretation, have declared imperative the force of their rules concerning affreightment upon foreign vessels if (or insofar as) the contract is to be performed in the country. These are outstanding examples of the most extended policy which evidently governs the exception to the conflicts rule on affreightment and not the rule itself.

The American courts have never doubted, before and after the Harter Act came into being, that they applied it compulsorily on the ground of public policy, not on account of some obscure dogma. The acts declaring exemptions from liability to passengers invalid expressly impose the prohibition as public policy. Of course, the Supreme Court has construed an affreightment made in the United States on an English vessel for a journey from an American port to England as an American contract so as to apply the Harter Act as a part of the governing law rather than to restrict the governing English law by an exception of American public policy. But this was expressly done, "unless the parties (to the contract) at the time of making it have some other law in view." The principle, until recently, appeared well settled that there had to be a particular interest of the United States, if American public policy should be invoked against a foreign law governing the contract.

A divergent conception, however, was developed in matters

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123 Argentina: C. Com. art. 1091.
Brazil: C. Com. art. 628 (these both speaking of contracts wherever stipulated but performable in the country).
Chile: C. Com. art. 975 par. 2 (speaking of the part of the contract concerning discharge of the vessel or other act to be made in the country).
Italy: Cass. (Oct. 15, 1929) Riv. Dir. Com. 1930 II 529; SCERNI 223 n. 2; but the intention of the parties has been considered in App. Venezia (Jan. 22, 1931), The "Stylianos," cited and criticized by SCERNI 217.
125 Distinctly to this effect, The Fri (C. C. A. 2d 1907) 154 Fed. 333; exemption clause under the stipulated law of Colombia for transportation from Carthage to Cienfuegos valid.
not covered by the Harter Act in the New York federal and state courts. It started in a case\(^{126}\) where the British White Star Line contracted with American excursionists who were represented by a tourist agency in Boston for passage from Montreal to Liverpool. The contract expressly referred to English law and required the passengers in case of injury to give notice to the company within three days after landing. On the journey to England, a school teacher from Indiana was grievously hurt by inexcusable negligence of a steward and, after landing, was brought from the ship's hospital to a hospital in Liverpool where she had to stay for months. To the claim for £50,000 damages, the line defended on the ground of omission of notice. The New York court, comparing the American law which would grant a reasonable time for giving such notice\(^{127}\) with English law allowing a shorter time to be fixed, found the former applicable by public policy against the expressed intention of the parties. The argument, in the words of Judge Rogers was that "the contract of exemption, being made in the United States, was void by the law of the place where it was made." Hence, even a Canadian travelling from Canada to England, would be protected by American law, if he contracts through an American agency. This extension of public policy, in the clothes of \textit{lex loci contractus}, has been authoritatively criticized as extravagant.\(^ {128}\) Evidently, reasons of fairness prompted the result which the court seemingly felt unable to sustain otherwise, viz., by a restrictive construction of the clause. It would make

\(^{126}\) Oceanic Steam Navigation Co. v. Corcoran (C. C. A. 2d 1925) 9 F. (2d) 724.
\(^{127}\) The Kensington (1901) 183 U. S. 263.
\(^{128}\) COOK, Legal Bases 408; see also Notes, 35 Yale L. J. (1926) 997; 10 Minn. L. Rev. (1926) 530. To the contrary, ROBINSON, Admiralty 559 asserts that the contract would be void under the federal statute of June 5, 1936, c. 521 § 2, 46 U. S. C. § 183 c; but since this statute is also limited to vessels from and to ports of the United States, I cannot see the basis of this assertion.
sense to dispense with formal notice of claim to the ship company in the case of a passenger treated by the ship's physician and brought ashore on a stretcher to a hospital by the crew. But also the recent federal legislation maintains formality in this respect.

However, the New York Court of Appeals has continued its way. In 1930 Judge Learned Hand in a dictum confirmed that the lex loci contractus governs a contract of carriage even though the parties expressly stipulate for another law. In another case dealing with no personal injury at all, but involving a cargo of silk, the shipowner was declared liable for loss from theft, despite a stipulation to the contrary and submission to British law in the bill of lading, and although the bill was issued in Shanghai, British Crown Colony, for carriage to Vancouver, British Columbia, and the theft in question occurred on this stage of the voyage. The only contacts with the forum were the facts that the bill of lading covered also the railroad transportation from Vancouver to New York and that the destination was a firm in New York. The court knew that no federal policy applied; it developed state policy of an intransigent character. Further, the exemption clause in a passenger transportation by airplane was invalidated under New York law because of booking and beginning of the transport at the airport of Albany, New York. A federal district court in New York has finally concluded that release of a common carrier from liability for his own negligence is held illegal and void in New York, evidently under all circumstances. In this case, indeed, the passenger's ticket was is-

120 Louis-Dreyfus et al. v. Paterson Steamships, Ltd. (1930) 43 F. (2d) 824, 826.
sued in the state, but the journey was to be made between Bergen, Norway, and Newcastle, England, and Norwegian law was stipulated. That the court, in addition, resorted to admiralty law, supposedly overruling the stipulation for another law, is another ground for astonishment.

It is difficult to reconcile this chain of cases with otherwise established rules. It approaches rather closely such fighting radicalism as is shown in the Italian Aviation Law, of August 20, 1923, declaring all clauses of exemption void irrespective of the law governing the contract. Opposing doctrines prevail. For instance, the Dutch Supreme Court has recognized an exemption clause regarding an air flight of a Dutchman from the airport in Bangkok on a plane of the Royal Dutch Aviation, valid under Siamese law but contrary to Dutch; the Canadian courts conceive that prohibitions of waiver of liability by the Railway Act of Canada are inapplicable so soon as the transport leaves the Canadian border, and so forth.

*Extraterritorial effect.* The Harter Act has been regularly applied abroad, if the contract of affreightment was considered governed by American law or when reference to it was inserted by the very wide use of an appropriated clause. In the latter case only, restrictions to its application may re-
sult from added clauses of exemptions, earlier discussed.\textsuperscript{136}

The same treatment has been given to the Australian Act of 1904\textsuperscript{137} and the Dutch Maritime Law.\textsuperscript{138}

\textit{International needs.} In such important international matters as the Hague Rules, a normal international situation would be guaranteed, if the peculiar public policy of each state were limited to certain cases. For example, in the majority of countries prohibitions on exemptions in maritime affreightment are imperatively imposed only on vessels loading the goods in a port of the prohibiting country, or, as it is usually put, issuing the bill of lading in such a port. Economically or politically justifiable extensions such as the American application of the domestic law to vessels arriving in American ports, are at least neat enough to be taken account of in contracts. A vessel travelling from Pernambuco to New York may adjust its bills of lading to both laws. But such practice as that of the New York courts is exorbitant when it insists on protecting all residents, or all persons booking in the state, wherever the journey begins

other cases. See also on the clause: "weight unknown," Ripert, 2 Droit Marit. 735 § 1782.

Germany: OLG. Hamburg in 20 Hans. GZ. (1899) HBl. 122; 26 \textit{id.} (1905) HBl. 227, 270; 28 \textit{id.} (1907) HBl. 244; cf. RG. (Sept. 24, 1930) Hans. RGZ. 1930 B 707.

The contract being considered governed by German law, the Harter Act was rejected: RG. (May 25, 1889) 25 RGZ. 104, 107.

Egypt: App. Mixte Alexandria (Jan. 25, 1939) 40 Revue Dor (1939) 231 (goods shipped from San Francisco; insurance clause invalid under Harter Act).

\textsuperscript{136} Supra pp. 388 ff.

\textsuperscript{137} Germany: OLG. Hamburg (March 17, 1913) 24 Hans. GZ. (1913) HBl. 157 No. 74, aff’d, RG. (Jan. 28, 1914) Hans. GZ. (1914) HBl. 108 No. 52.

The Netherlands: Rb. Rotterdam (Dec. 15, 1926) W. 12048, 21 Revue Dor 447 (Australian Act of 1904 declared to have been agreed upon with force against the special clauses for exemption!).


and ends. If other countries were to reciprocate this claim, there would be chaos again. On the other hand, the English courts are generally believed to be too much inclined to accept a reference to English law, irrespective of geography. The *Vita Food’s* case has given new force to this reputation inasmuch as an exemption under English law prevailed in the court, although the vessel departed from Newfoundland to the United States. However, in this case the material point was simply whether the omission of the “clause paramount” nullified the bill of lading—which question was negatived primarily under English and, more cautiously, under Newfoundland law—whereas the exemption clause itself was as good under the Hague Rules adopted in Newfoundland as under those adopted in England. Hence, at least, the Privy Council did not detract from the internationally acquired ground of the Hague Rules. These are the painfully won result of long negotiations among shipowners, affreighters, maritime agents, exporters, and insurers of the greater part of the world. The compromise was so delicate that the legal experts at the Brussels Conference did not dare to reform the naïve drafting, and that opposition is still flaring in some quarters. It would be irresponsible for any court even of countries not participating in the Convention to jeopardize its operation by a unilateral public policy applied to vessels on foreign voyages. The more so should courts of member states recognize the prohibitions prevailing at the place where the bill of lading is issued irrespective of the distinction whether the Hague Rules are adopted at this place by ratification or only by independent enactment.139

Similar considerations may come to the rescue of the much criticised decision of the English Court of Appeals in *The

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139 Such a distinction is made, however, by KNAUTH, *The American Law of Ocean Bills of Lading* (ed. 2, 1941) 120 probably on the ground of a literal interpretation of art. 10 of the Brussels Convention.
The vessel carried oranges from Jaffa in Palestine to Hull in England. The Palestine Ordinance, which had adopted the Hague Rules was concerned with bills of lading issued in Palestine, while the analogous British statute was confined to bills of lading issued in Britain. By stipulating for English law, the bill of lading issued in Palestine consequently would have allowed clauses of exemption prohibited by the Hague Rules, despite both laws adopting them. The court acted wisely in depriving this stipulation of such force. The technical arguments of the judges, it is true, are easily challenged. The presumptive intention of the parties was a weak support; general recognition of any illegality provided by the lex loci contractus is untenable; and a bill of lading is not void, without an express and inadvisable legal sanction, solely because the "paramount" clause is omitted. But regard for the law of a friendly nation may very well prevail precisely in this subject.

IV. Conclusions

Contrary to many assertions, the leading conflicts laws do not recognize any imperative rules governing a priori (supra I, r). Equally, the often repeated general postulate that the parties can select a law only if it has a substantial connection with the contract, has proved a fallacious idea (supra I, 3). It is true, the use of this idea in more recent American usury cases has produced a unique and specially elaborated compromise among the regulations of interest on loans in the various sister states (supra II, 1). This may well serve as a model to solve other particular conflicts, restricting rather than freely allowing the public policy of the forum in its opposition to a stipulated foreign law. However, a general rule confining the choice of law by the parties to a certain number of legislations is impracticable; the transfer

of the American interstate policy in usury cases into the field of international commerce would be disastrous.

In a somewhat different manner, also the American cases concerned with insurance contracts testify to a struggle between the clauses for application of foreign law and public policy of the forum. Here, outstanding local interests in protecting citizens and supervising intrastate business have found a basis in the constitutional decisions of the Supreme Court (supra II, 2). The last word has not been spoken, however, and general inferences drawn from this delicate subject would be highly adventurous.

The important topic of exemptions from liability shows another similar strife (supra III). If it is borne in mind that any resort to domestic prohibitions must be justified by stringent public policy claiming to dominate the contract, courts will refrain from imposing the policy of their states upon prevailingly foreign relations. On the other hand, international commerce should be restricted as well as protected by common compromise rather than one-sided dictates.

Excluding the dubious exception of public policy, there is only one tangible leading idea emerging from the manifold confused attempts to restrict party autonomy. This is the desire to obviate evasion of law. But we have found merely one situation in which in the universal opinion a law is not permitted to be avoided, that is, when a contract by all (not only by some) substantial connections belongs to one sole jurisdiction and, thus, is devoid of all considerable foreign elements. The claim of any state exclusively to govern contracts entirely radicated in its territory is well enough founded to justify its recognition by all other states.

While in the case just mentioned the parties are precluded from selecting a foreign law against imperative domestic rules on an objective basis, the theory of fraus legi facta disapproves always and only the evident purpose of
evasion in an agreement. The French and also some Ameri­
can courts are inclined to favor this idea. It is well known
how difficult is the proof that the main purpose of an obliga­
tory agreement was intentionally to avoid the application of
a law. On the other hand, what may be regarded as evasion
from the angle of one country, may be recognized elsewhere
as legitimate resort to another law, particularly in the state
whose law is adopted. If a contract has more than one terri­
torial connection, there is no reasonable background for its
compulsory attribution to one state just because this state is
hostile to the contract and the parties feared frustration by its
law.

The entire problem, therefore, reduces itself to two ques­
tions involving contracts with multiple local connections.

First, what is the public policy on the ground of which
courts may react against the choice of a foreign law?

Second, under what conditions should the overriding
policy of one state be recognized by the others?

While public policy as a unilateral means of barring the
play of conflicts rules is an old subject of discussion, the
mutual respect for internationally significant policies is in
its very first development.

Deferring both questions to the following chapters, we
may conclude by urging that party autonomy should not be
wantonly discarded for the sake of local policies. A minimum
requirement for any court should be a solicitous analysis of
the extraterritorial value of state policy in relation to inter­
state and international needs. Never should it be forgotten
that party autonomy is the least dangerous method of bring­
ing certainty into the agitated problems of international
private law, and thus, helps to produce that “swift and
certain rule” so important to merchants.

141 Celebrated words, see the citations by HIRAM THOMAS, “The Federal Sales
Bill etc.,” in 26 Va. L. Rev. (1940) 542.